Public Prosecutor v Sarjit Kaur a/p Najar Singh

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45-4 OF 1997
VISU SINNADURAI J
26 NOVEMBER 1997

Evidence *— Circumstantial evidence — Standard of proof — Trial by judge alone — Inference from facts — Court must be satisfied of accused's guilt beyond reasonable doubt — No further duty to make direction — Whether prosecution could infer motive from the facts*

Evidence *— Statement — Accused's statement taken without administering caution — Whether accused had already been arrested when making statement — Whether statement admissible*

Criminal Procedure *— Trial — Close of prosecution's case — Whether 'beyond reasonable doubt' test or 'prima facie' test — Whether the Criminal Procedure Code (Amendment) Act 1997 has retrospective effect*

The accused was charged under s 302 of the Penal Code (FMS Cap 45) for the murder of her husband. He was found killed in the house whilst asleep and was in a sleeping position when he was slashed on the neck four times by the assailant. The prosecution relied solely on circumstantial evidence in attempting to establish that it was the accused who killed her husband.

The prosecution attempted to infer motive for the killing by relying on several facts. Firstly, the prosecution alleged that the accused was an unfaithful wife. There was also some allegation that she was having an affair with someone else. Secondly, the prosecution adduced evidence to show that despite evidence to the contrary to indicate that the accused and her husband was a loving couple, the relationship between them was not as good as it was made out to be. The prosecution also suggested that the accused was often beaten by her husband and that she nursed a hatred for her husband because she could not take the ill-treatment anymore. Thirdly, the prosecution argued that the accused was in a position to benefit financially on the death of her husband. The prosecution alleged that if the events occurring before and after the killing and the all the evidence were taken into consideration, it would point to the guilt of the accused.

Some traces of blood marks were found on a dress belonging to the accused. The accused had made a statement to the police by nodding her head when asked whether that was the dress she was wearing on the night of the killing. The issue that arose was whether the accused had been arrested when the statement was made. The deputy public prosecutor argued that the accused was, and as such the statement was admissible. The other issue that arose was the standard of proof required of the prosecution, whether it was sufficient for the prosecution, at the end of its case, to make out a prima facie case.

Held, acquitting and discharging the accused:

(1) In cases where circumstantial evidence is relied upon by the prosecution, the proper test to be applied by the judge trying the case without a jury is for the judge to be satisfied as to the guilt of the accused beyond reasonable doubt. The failure by the court to expressly state that the evidence proved irresistibly pointed to one and only one conclusion, the guilt of the accused, was not fatal and it would suffice if it merely said that it was satisfied as to the guilt of the accused beyond reasonable doubt (see p 191G–I); *Jayaraman & Ors v PP* [1982] 2 MLJ 306; *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 and *Ng Thian Soong v PP* [1990] 2 MLJ 148 followed.

(2) It was difficult to draw any reasonable inferences that the accused's motive in killing her own husband was because of his ill-treatment of her. There was also no evidence to show that the husband had been unfaithful to her and that she had been jealous of someone else. There was, however, evidence to show that the deceased and the accused had gone on holidays abroad together and that he had paid a huge deposit on a car for the wife. The argument that she was in a position to benefit financially on the death of her husband was unacceptable as there was sufficient evidence that she was not the sole or main beneficiary of the insurance policies or that she was unlikely to inherit anything without resistance from her husband's family. Based on these facts, the prosecution had failed to establish any motive on the part of the accused to have her husband killed (see p 195B–F).

(3) Taken as a whole or in isolation, none of the evidence pointed to the guilt of the accused. Much of these explanations were speculative in nature, raising much doubts. Even the combined effect of the evidence raised a doubt on whether the accused had planned to kill her husband that night. Furthermore, the prosecution did not adduce any evidence of fingerprints found on any of the exhibits (see p 199B–D).

(4) The statement made by the accused regarding the dress she was wearing on the night her husband was killed was inadmissible as it was made after her arrest without any caution having been administered.

Even if the court was wrong to have taken this view, the manner in which the dress had the blood stains was not clearly established by the prosecution. Also, little importance could be placed on the statement as the stains could have been caused when the accused held her husband in her arms on seeing him dead or at any other time when she held him (see pp 203H–I and 204A).

(5) The proper test to be applied at the end of the prosecution's case is the test of 'beyond reasonable doubt', not the 'prima facie' test. The amendments made by the Criminal Procedure Code (Amendment) Act 1997 only apply to criminal offences committed

on or after 31 January 1997 and were not retrospective in operation. On the maximum evaluation of the evidence available, the prosecution at the end of its case had failed to establish a case against the accused beyond reasonable doubt as required under s 180 of the CPC (see pp 206D–E and 207G); *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ and *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 followed.

[Bahasa Malaysia summary

Tertuduh dipertuduhkan di bawah s 302 Kanun Keseksaan (NMB Bab 45) atas pembunuhan suaminya. Dia telah dijumpai terbunuh di rumah sewaktu tertidur dan berada dalam keadaan tertidur apabila dia dikelar pada lehernya sebanyak empat kali oleh penyerang. Pihak pendakwa bergantung sepenuhnya kepada keterangan ikut keadaan dalam percubaan untuk membuktikan bahawa tertuduh telah membunuh suaminya.

Pihak pendakwa cuba membuat inferens motif untuk pembunuhan dengan bergantung kepada beberapa fakta. Pertama, pihak pendakwa mengatakan bahawa tertuduh adalah isteri yang berlaku curang. Terdapat juga pengataan bahawa dia membuat hubungan cinta dengan orang lain. Kedua, pihak pendakwa mengemukakan keterangan untuk menunjukkan bahawa walaupun terdapat keterangan bertentangan bagi menunjukkan bahawa tertuduh dan suaminya adalah pasangan yang penyayang, perhubungan di antara mereka bukanlah sebaik sebagaimana yang kelihatan. Pihak pendakwa juga mencadangkan bahawa tertuduh kerap dipukul oleh suaminya dan bahawa dia menaruh kebencian untuk suaminya kerana dia tidak tahan lagi dengan penganiayaan. Ketiga, pihak pendakwa menghujahkan bahawa tertuduh berada dalam kedudukan untuk menerima manfaat kewangan atas kematian suaminya. Pihak pendakwa mengatakan bahawa sekiranya peristiwa yang berlaku sebelum dan selepas pembunuhan dan semua keterangan dipertimbangkan, ia akan menunjukkan tertuduh bersalah.

Beberapa kesan tanda darah telah dijumpai pada sehelai baju kepunyaan tertuduh. Tertuduh telah membuat suatu pernyataan kepada polis dengan mengangguk kepalanya sewaktu ditanya sama ada baju itu adalah baju yang dipakainya pada malam pembunuhan berlaku. Isu yang timbul adalah sama ada tertuduh ditangkap ketika pernyataan dibuat. Timbalan pendakwa raya menghujahkan bahawa tertuduh adalah ditangkap, dan oleh itu pernyataan boleh diterima. Isu-isu lain yang berbangkit adalah darjah membukti yang dikehendaki daripada pihak pendakwa, sama ada ia mencukupi untuk pihak pendakwa untuk membuat kes prima facie di penutup kesnya.

Diputuskan, membebaskan dan melepaskan tertuduh:

(1) Dalam kes-kes di mana pihak pendakwa bergantung kepada keterangan ikut keadaan, ujian yang betul untuk dipakai oleh hakim yang membicarakan kes tanpa juri adalah hakim harus

berpuas hati tentang kesalahan tertuduh melampaui keraguan munasabah. Kegagalan mahkamah untuk menyatakan secara nyata bahawa keterangan yang dibuktikan menunjukkan dengan jelasnya kepada satu kesimpulan dan satu kesimpulan sahaja, iaitu kesalahan tertuduh, bukanlah padah dan adalah mencukupi sekiranya ia cuma mengatakan bahawa ia berpuas hati atas kesalahan tertuduh melampaui keraguan munasabah (lihat ms 191G–I); *Jayaraman & Ors v PP* [1982] 2 MLJ 306; *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 dan *Ng Thian Soong v PP* [1990] 2 MLJ 148 diikut.

(2) Adalah sukar untuk membuat sebarang inferens munasabah bahawa motif tertuduh dalam membunuh suami sendiri adalah akibat penganiayaan terhadapnya. Tiada juga keterangan untuk menunjukkan bahawa suami telah berlaku curang terhadapnya dan bahawa tertuduh cemburu terhadap orang lain. Namun demikian, terdapat keterangan untuk menunjukkan bahawa si mati dan tertuduh telah bercuti bersama ke luar negeri dan bahawa si mati telah membayar deposit yang besar untuk sebuah kereta bagi isterinya. Hujah bahawa dia berada dalam kedudukan untuk menerima manfaat kewangan atas kematian suami tidak boleh diterima kerana terdapat keterangan yang mencukupi bahawa dia bukanlah benefisiari tunggal atau benefisiari utama polisi insurans atau bahawa dia tidak mungkin mewarisi apa-apa harta tanpa bantahan daripada keluarga suaminya. Berdasarkan fakta-faktanya, pihak pendakwa telah gagal membuktikan sebarang motif pada pihak tertuduh untuk membunuh suaminya (lihat ms 195B–F).

(3) Diambil secara keseluruhan atau secara berasingan, tidak satu daripada keterangan menunjukkan kesalahan tertuduh. Kebanyakan daripada penjelasan-penjelasan ini adalah bersifat spekulatif, dan menimbulkan banyak keraguan. Malah kesan bergabung keterangan menimbulkan keraguan tentang sama ada tertuduh telah merancang untuk membunuh suaminya pada malam itu. Tambahan pula, pihak pendakwa tidak mengemukakan sebarang keterangan tentang cap jari yang dijumpai pada mana-mana ekshibit (lihat ms 199B–D).

(4) Pernyataan yang dibuat oleh tertuduh mengenai baju yang dipakainya pada malam suaminya dibunuh tidak boleh diterima kerana ia dibuat selepas tangkapannya tanpa pemberian sebarang amaran.

Sekalipun mahkamah adalah salah dalam mengambil pandangan ini, cara dalam mana baju mempunyai kesan darah tidak dibuktikan dengan jelasnya oleh pihak pendakwa. Juga, kepentingan yang sedikit boleh diletakkan pada pernyataan kerana kesan mungkin telah disebabkan apabila tertuduh memeluk suaminya apabila mendapati suaminya telah meninggal dunia atau pada bila-bila masa apabila memeluk suaminya (lihat ms 203H–I dan 204A).

(5) Ujian yang betul untuk dipakai di penghujung kes pihak pendakwa adalah ujian 'melampaui keraguan munasabah', dan bukan ujian 'prima facie'. Pindaan oleh Akta (Pindaan) Kanun Acara Jenayah 1997 hanya terpakai kepada kesalahan jenayah yang dilakukan pada atau selepas 31 Januari 1997 dan tidak beroperasi secara kebelakangan. Atas penilaian maksima keterangan yang ada, di penutup kesnya pihak pendakwa telah gagal membuktikan kes terhadap tertuduh melampaui keraguan munasabah seperti yang dikehendaki di bawah s 180 KAJ (lihat ms 206D–E dan 207G); *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 dan *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 diikut.]

Notes

For cases on standard of proof of circumstantial evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 390–405.

For a case on accused's statement taken without administering caution, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1469.

For cases on close of the prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2899–2915.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (folld)
Bahruni bin Ismail v Pendakwa Raya [1997] 2 MLJ 26 (refd)
Chan Chwen Kong v PP [1962] MLJ 307 (refd)
Cheah Boon Tat v PP [1995] 2 MLJ 614 (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (folld)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (folld)
Jayaraman & Ors v PP [1982] 2 MLJ 306 (folld)
Karam Singh v PP [1967] 2 MLJ 25 (refd)
Leong Hong Khie v PP [1986] 2 MLJ 206 (refd)
Liow Siow Long v PP [1970] 1 MLJ 40 (refd)
Mohamed bin Salleh v PP [1967] 1 MLJ 184 (refd)
Ng Thian Soong v PP [1990] 2 MLJ 148 (folld)
Parry v Boyle (1986) 83 Cr App R 310 (refd)
PP v Abu Bakar bin Abdul Malek [1990] 1 CLJ 1179 (refd)
PP v Neoh Wan Kee [1985] 1 MLJ 368 (folld)
PP v Rosyatimah bte Neza & Anor [1989] 1 MLJ 360 (folld)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
R v Beck [1982] 1 All ER 807 (refd)
R v Makanjuola [1995] 3 All ER 730 (refd)
R v Phillips (1936) 26 Cr App R 17 (refd)
Subramaniam v PP [1956] MLJ 220 (refd)
Sunny Ang v PP [1966] 2 MLJ 195 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 158, 159, 162, 180
Criminal Procedure Code (Amendment) Act 1995
Criminal Procedure Code (Amendment) Act 1997

A Federal Constitution art 7(1)
Penal Code (FMS Cap 45) s 302

Zakaria Merican (Deputy Public Prosecutor) for the prosecution.
Gurbachan Singh, Kartar Singh and *Manmohan Singh* (*Bachan & Kartar*) for the accused.
B

Visu Sinnadurai J:

Introduction

Mr Marid Singh ('Marid'), aged 37, was a self-made man. His was a C typical success story of rags to riches, having started his working career as an insurance salesman and a part-time watchman and at the time of his death, he was both a director and a shareholder of several companies. He also had interests in the Tequila Trio Pub in Subang Jaya and the Olimpia Sports Club in Ampang.

D On 8 October 1996, Marid was killed in the still of the night in his own house whilst asleep. It was a brutal killing — four slashes on the neck. Marid was in a sleeping position when he was slashed by the assailant. No one witnessed the killing. On the night of the killing, his wife Sarjit Kaur, his mother-in-law, his three children — Mahaveer (aged 13), Ranveer (aged 11), Harpeet Kaur (aged five) — and two maids were also at the E house. Investigation on the murder was initiated by the police swiftly and almost immediately, his wife was arrested and 14 days later, she was formally charged for the murder of her husband.

The charge

F The accused was originally charged as follows:

> Bahawa kamu pada 8 Oktober 1996 di antara jam 2 pagi sehingga 4.30 pagi, di rumah No 33 Jalan SS 1/25, Kampung Tunku, Sungai Way, dalam daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, dengan niat untuk membunuh telah melakukan satu pembunuhan ke atas seorang lelaki G Sikh bernama Marid Singh s/o Pritam Singh (Kpt No 590423–08–5185). Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan (NMB Bab 45). (P2A)

However, at the end of the prosecution's case, the deputy public prosecutor ('DPP') made an application to amend the charge under s 158 of the H Criminal Procedure Code (FMS Cap 6) ('the CPC') to alter the time stated in the charge at which the alleged offence was committed, from 2–4.30 in the morning to 12.40–4.30 in the morning. This amended charged read as follows:

> Bahawa kamu pada 8 Oktober 1996 di antara jam 12.40 pagi sehingga 4.30 pagi, di rumah No 33 Jalan SS 1/25, Kampung Tunku, Sungai Way, di I dalam daerah Petaling Jaya, di dalam negeri Selangor Darul Ehsan, dengan niat untuk membunuh telah melakukan satu pembunuhan ke atas seorang lelaki Sikh bernama Marid Singh s/o Pritam Singh (Kpt No 590423–08–5185). Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan (NMB Bab 45). (P54)

After due consideration, this court allowed the application to amend the charge. The procedure under s 159 of the CPC was then complied with.

The charge was then read to the accused and the accused maintained the plea of not guilty. As the accused indicated through her counsel that she was ready to be tried on the new charge, the trial then continued. No witnesses were recalled by the prosecution or by the accused under s 162 of the CPC.

The trial

In 1995, by virtue of the Criminal Procedure Code (Amendment) Act 1995 which came into force on 17 February 1995, jury trials were abolished in Malaysia. As the alleged offence in the present case was committed after the coming into force of the CPC (Amendment) Act 1995, this trial was conducted without a jury: see *Cheah Boon Tat v PP* [1995] 2 MLJ 614.

So far, the trial has lasted for almost a month, having commenced on 22 October 1997. The prosecution has called 26 witnesses to testify. The judge's notes of evidence, thus far, has run in excess of 400 pages. These witnesses testified as to the relationship between the deceased and his wife, the relationship between the wife and the family of the deceased, the background of the deceased and the wife, and also the business dealings of the deceased. Through all these evidence, the prosecution was attempting to establish that it was the wife who killed the husband.

Though the story as unfolded by the prosecution witnesses bore close resemblance to that of an Agatha Christie or any other whodunit mystery novel, it is important to emphasize that at this stage, the duty of the court is not to resolve the mystery by determining who killed Marid, but rather in the light of the evidence before this court whether it had been established that it was the accused who killed her husband. Mysteries are solved by police investigations, whilst culpability is determined by the courts of law on available evidence.

As the prosecution's case was based solely on circumstantial evidence, I shall briefly state the law on circumstantial evidence, before I consider the evidence.

Law on circumstantial evidence

Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact in issue may be inferred. Some examples of circumstantial evidence are: (a) motive; (b) acts preparatory to the commission of the offence; (c) fingerprints; (d) possession of stolen goods; and (e) presumptions of fact.

The law on circumstantial evidence is stated by the learned editors of *Blackstone's Criminal Practice 1991* at pp 1674–1675 as follows:

> Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue. In the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal

knowledge, for example, 'I saw the accused strike the victim'. Circumstantial evidence is evidence of relevant facts, ie facts from which the existence or non-existence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence. For example, the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.

The learned editors point out further:

> Circumstantial evidence 'works by cumulatively, in geometrical progression, eliminating other possibilities' (*Director of Public Prosecutions v Kilbourne* [1973] AC 729, per Lord Simon at p 758). Pollock CB, likening circumstantial evidence to a rope comprised of several cords, said:
>
> > One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.
>
> Thus, it may be in circumstantial evidence that there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion but the whole, taken together, may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of (*Exall* (1866) 4 F & F 922 at p 929).
>
> However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that:
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> > It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (*Teper v The Queen* [1952] AC 480, per Lord Normand at p 489).
>
> Nonetheless, there is no requirement, in cases in which the prosecution's case is based on circumstantial evidence, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (*McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276).

Similar to the English position, it is also now established in Malaysia that in cases where circumstantial evidence is relied upon by the prosecution, the proper test to be applied by the judge trying a case without the jury is for the judge:

> ... to remember only that the prosecution need prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, ... in a case depending on circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt (per Suffian LP in *Jayaraman & Ors v PP* [1982] 2 MLJ 306 at p 310).

Abdoolcader FJ in *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 at p 275 restated the above principle as follows:

> Where circumstantial evidence is the basis of the prosecution case, the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in the case tried without a jury the failure by the court to expresly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors v PP* [1982] 2 MLJ 306).

Similarly Mohd Azmi SCJ in *Ng Thian Soong v PP* [1990] 2 MLJ 148 observed (at p 151):

> It must be noted at this point since *Jayaraman & Ors v PP* [1982] 2 MLJ 306, the then Federal Court had applied *McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276, by holding that a trial judge's direction to the jury on burden of proof is the same whether the prosecution's evidence is direct or circumstantial, ie proof beyond reasonable doubt. Where the evidence is circumstantial, there is no further duty on the judge as in the past, to direct the jury that the evidence must be such as to be inconsistent with any other reasonable conclusion or hypothesis than the guilt of the accused in addition to proof beyond reasonable doubt.

His Lordship then added at p 151:

> But be that as it may, these authorities do not relieve the trial judge from the duty to make a balanced direction to the jury on other reasonable inferences that could be drawn from any particular circumstantial evidence, particularly where they are equally favourable to the accused.

Though some of these observations were made in cases where the trial was with a jury, they are equally applicable with the necessary modifications to a trial conducted by a judge sitting alone without a jury, as I do in the present case.

Inferences from circumstantial evidence

In determining the proper inference to be drawn from circumstantial evidence, the Supreme Court in *Ng Thian Soong v PP* pointed out as follows (at p 150):

> ... Where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial judge merely to tabulate the indirect evidence. He must go one step further by directing the jury what other reasonable inferences could be drawn from each strand of circumstantial evidence, and leaving it to the jury to decide which inference they wish to adopt. It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding could be arrived at as to the guilt of the accused.

His Lordship then concluded (at p 150):

> Bearing in mind that unlike statutory presumption, there is no shift in the burden of proof on the prosecution where the evidence is circumstantial, it is necessary for the trial judge not to give the impression that there need only be one inference that can be drawn from every circumstantial evidence. The principal circumstantial evidence in the present case are clearly open to more than one reasonable or plausible inference, and failure to put them

squarely to the jury would in the circumstances occasion a miscarriage of justice.

His Lordship pointed out that it was the duty of the trial judge to make a balanced consideration of other reasonable inferences that could be drawn from any particular circumstantial evidence, particularly where they were equally favourable to the accused.

Circumstantial evidence can sometimes be stronger than direct evidence as there is no possibility of it being like a witness's testimony which may be lacking in truth or accuracy. In circumstantial evidence, the motives or acts speak for themselves, sometimes louder than the words of a witness, without any embellishment.

It should also be pointed out that circumstantial evidence does not depend on hypothesis, or theories, or even speculations. They must give rise to strong inferences so as to become the best evidence.

Motive

In the two leading cases where, based on circumstantial evidence, a conviction for murder was upheld, the motives for the killings were clearly established. In *Sunny Ang v PP* [1966] 2 MLJ 195, it was clearly established that the accused committed the murder so as to benefit from some insurance policies which had recently been taken out in the deceased's name. Likewise in *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232, it was established that the motive for the killing was political rivalry and ambition.

Let me consider the alleged motive of the accused in the present case. The learned DPP puts it as follows:

(a) Infidelity

The accused was an unfaithful wife. She often went out, and on occasions when her husband was overseas, she would come back home late. There was also some allegation that she was having an affair with Mohd Salim bin Baka ('Salim') (PW9), but this was firmly denied by Salim himself in evidence, as well as Salim's wife, Parvin Akhtar bte Mohd Shariff ('Parvin') (PW8). Parvin also said in her testimony that Marid had told her, with seemingly no disapproval on his part, that he knew that his wife and Salim were old friends.

The prosecution also appeared to suggest that much of the quarrels which the accused and the deceased had were because of the accused coming back home late.

Much of this suggestion was obtained through the testimony of Amardam Kanan (PW19), also known as Shanta, the maid. Shanta also said that there was also one incident where the accused had taken her to a hotel and kept her waiting in the lobby whilst the accused went upstairs with her daughter to meet a male friend. In another incident, it was said by Shanta that in the Sikh temple, the accused had pointed out to her two men and had asked Shanta which of them was more handsome, whilst on another, the accused had given her a photograph of a 'handsome man' for Shanta to keep.

Based mainly on this testimony of Shanta, the prosecution was attempting to establish that the accused was an unfaithful wife.

It is difficult to draw an inference of infidelity based on these evidence alone. The mere fact that a wife goes away after a quarrel does not mean she is unfaithful. In fact, in the present case, through the evidence of Rosli Abdul Rahman ('Rosli') (PW4), it was established that on the last occasion the accused left the house, she had gone to her mother's house. Furthermore, the evidence of Parvin and her husband Salim clearly show that the accused and Salim were merely 'ordinary friends' with no romantic links between them. True, it was that Parvin was initially jealous, but when she learnt of their true relationship, she ceased to be so.

(b) Frequent quarrels between the deceased and the accused

The prosecution attempted to establish that despite evidence to the contrary to indicate that the deceased and the accused were a loving couple, as stated by the evidence of Rosli, Ravindren Sivalingam (PW5) as well as Anthony Leopold ('Anthony') (PW26), all of whom, it must be observed, were disinterested witnesses, the relationship between the couple was not as good as it was made out to be. Evidence was adduced from Shanta to show the frequency of these quarrels. The prosecution also called Sariah bte Abdul Wahab (PW12) whose house was across the road from the Marids to testify that she often heard exchanges of words between the deceased and the accused. Emily Koshy Mathew ('Mrs Koshy') (PW13), another neighbour, also testified that quarrels between the couple were a 'regular affair'.

The prosecution also highlighted, through the evidence of several witnesses like Balwant Singh (PW10) and Shanta, a big quarrel between the couple in public at Tequila Trio Pub at Subang Jaya on a certain night, a few months before Marid's death. On another occasion, on 29 September 1996, Mrs Koshy, the good neighbour as she is who hears and sees most things in Marid's house, said she witnessed an incident where the deceased was holding the accused with a knife in his hand. She also testified that when Mahaveer Singh, the eldest son, asked the father what was happening, Mrs Koshy heard his father reply 'your father is dead, your father is dead'.

The prosecution also suggested, through the testimony of Shanta, that the accused was often beaten by her husband, usually in their bedroom. Sometimes, when such beatings took place, the accused would leave the house for three or four days without returning. Where she had gone to, however, was not made clear by the prosecution.

It was the submission of the DPP that these incidents indicate that the accused was not 'a simple housewife'. Because of all these ill-treatments, she came to a stage where she could no longer accept the 'ill-treatment she received; especially after the threat to her life, she could take it no longer', so she nursed a hatred for her husband. As such, the DPP observed:

> The accused wanted an independent life, wanted someone who cared for her, not to be beaten or abused. Though living in a big house, she had no peace of mind; and also because the deceased was hot tempered and he

A abused her and beat her, her motive was, it was suggested, to kill the husband.

As to why, if these were her real feelings, she chose not to leave her husband or divorce him as suggested by counsel for the defence, was not alluded to. In any case, it is difficult to draw any reasonable inferences that B the accused's motive in killing her own husband was because of his so-called ill-treatment of her. Furthermore, there was no evidence that the husband had been unfaithful to her and that she had been jealous of someone else. On the contrary, there was evidence to show that the deceased and the accused had gone on holidays abroad together, and that just before his death, the deceased had paid a huge deposit for the purchase C of a Mercedes-Benz car for his wife.

(c) Financial benefits

The other motive attributed to her was the financial aspect, that she was in a position to benefit financially on the death of her husband. This D argument is wholly unacceptable as there was sufficient evidence that she was not the sole or main beneficiary of any of the insurance policies or that she was likely to inherit his business, or even for that matter, she would obtain the full benefit from his properties — the house in Kampong Tunku and the shophouse in Brickfields as both these properties were heavily E mortgaged to the bank. Furthermore, she must have known that because of her strained relationship with her husband's family, she was unlikely to inherit everything without some resistance from them.

Based on the above factors, it is this court's findings that the prosecution has failed to establish any motive on the part of the accused to have her husband killed. As stated earlier, this case is unlike that of *Sunny* F *Ang* or *Dato' Mokhtar bin Hashim*, where the motive for the killing was clearly established.

(d) Preparatory plans

G It was suggested by the prosecution that if one considers the events just before the death of Marid and also immediately thereafter, it was clear that the accused had planned the killing systematically. According to Shanta, on the night of the killing, the accused had, at about 9.30 in the evening, insisted that the two maids together with the three children went to bed earlier than usual.

H This evidence of Shanta, however, was contradicted by Che Lah bin Rajab (PW7), the driver who said that Mahaveer was with him in the car until about 10 o'clock that evening.

Secondly, it was said that on the night of the killing, the accused was not sleeping with her husband but had instead chosen to sleep downstairs I in the same room as her mother who had stayed the night at her house as she was unwell.

The DPP also questioned as to why she did not scream or go berserk or run for help when she discovered her husband had been slayed. Whether

she did or she did not, we do not know as a matter of fact. What the prosecution was contending was that just because Mrs Koshy, the friendly neighbour who is said to hear and know everything in the Marid house did not hear any screams, the accused could not have screamed.

Mrs Koshy, however, said she heard in the early morning the voice of the accused crying, 'Why are you beating me like this?' which the defence counsel contended had been misheard by Mrs Koshy for the words 'Why have you left me like this?', both of which in Punjabi sound not dissimilar. It must be remembered that Mrs Koshy lives in another house at the back of the Marid house. There is a wall separating their houses. Furthermore, the master bedroom where Marid was killed is at the front of the Marid house. Though she may have heard and seen on certain occasions what went on in the Marid house, it cannot be expected of her to know everything and to hear every word which was uttered by the occupants in the Marid house. No matter how much proximity there was, one cannot assume that just because Mrs Koshy did not hear anything else being said that night, it was not said.

The prosecution also submitted that the conduct of the accused immediately after discovering that her husband had been killed was inconsistent with her innocence — besides not screaming, she did not call the police immediately but instead called the deceased's mother and brother at about 4.30 in the morning. Surely such a reaction is perfectly acceptable as it is often the case in an emergency that one would call family members before calling the police.

Again, it was said that when her brother-in-law Parl Singh (PW21) came to the house that morning, the accused was in a position to point out to him the traces (the mud in the bathroom, the bathroom window left open, the rear gate being ajar) which the alleged intruder had left behind.

I should also point out that it is not a universally accepted fact, especially amongst psychologists, that screaming is a normal expression of sorrow and grief in every case. People react differently under different or even under similar circumstances. Even in this case, when the deceased's mother saw her son dead, there was no evidence to indicate that she screamed or that she fainted. Neither was there any evidence of Shanta, the maid nor Mahaveer, the deceased's son fainting. Therefore, it cannot be accepted as a standard reaction that on finding one's husband dead or one son's dead one must necessarily scream or faint.

I now consider the other factors of the prosecution's case.

Alleged incriminating evidence

It was submitted by the prosecution that the following evidence taken together with the other evidence also point to the guilt of the accused.

(a) The knife (P9)

There was much testimony on the knife. Shanta had said that she saw the knife hanging on the wall of the outside kitchen when she came down to

fetch some water before going to sleep that night. She said that the knife was found missing the next day until it was found in the drawer in the inside kitchen, where the knife is usually kept otherwise by her. Doubts arise as whether Shanta did in fact see the knife hanging on the wall of the outside kitchen, or as to whether it was even possible for her to have seen it if the lights to the outside kitchen were switched off. Further, did Shanta put the knife back into the drawer and had forgotten about it? Did the other Indonesian maid, Triani, do so? There were no clear answers to these questions.

In any event, it had not been proved to this court that the knife was in fact the murder weapon. All that we have before us is that the deceased was slain. Associate Prof Dr Kasinathan Nadesan (PW 15), when shown the knife in court, merely said that it could possibly have been used to cause the said injuries to the deceased. So could any other similar knife, or a sword, or even a parang for that matter.

In other aspects too, the knife was the cause of much controversy and also mystery. The pathologist, Prof Kasinathan said he had not seen this knife ever before, except during the course of this trial when he was giving evidence in court and when it was shown to him. Yet ASP Rosley (PW23) when asked to clarify on this issue said that he was confident that he had shown the knife to Prof Kasinathan on the same day when the body of the deceased was taken to the University Hospital for the post mortem.

Therefore, I hold that the knife by itself does not establish anything more than that it could possibly have been used to cause the injuries. The learned DPP himself honestly admitted, when asked to clarify whether there was any evidence before this court to establish the fact there were blood stains on the knife, that there was none. For reasons stated above, the significance of the knife has been much over emphasized.

(b) The dress (the maxi) (P20A), the tae-kwon-do outfit (P14B) and the t-shirt (P19A)

Amongst the items retrieved by ASP Rosley whilst at the house that morning was a t-shirt, a tae-kwon-do outfit, a dress, and a skirt and blouse which the accused was wearing.

Some minute traces of blood marks were found on the dress and the tae-kwon-do outfit. The prosecution submitted that these blood stains, especially on the dress, indicated that the blood of the deceased must have spurted onto the accused's dress when she slayed her husband. On cross-examination, various explanations were advanced as to other probable situations in which the blood could have dripped onto the dress. Therefore, in the absence of any clear evidence to establish this fact, not much importance could be placed on the presence of the blood stains on the dress. Furthermore, the chemist who was the only witness to give testimony regarding these blood marks stated that the marks were found in the lower part of the dress around the stomach area. If the accused was indeed in a kneeling position, as contended by the prosecution, how could the blood

of the deceased have spurted onto the dress when it would have been shielded by the mattress on which the deceased was sleeping at that time.

In *Karam Singh v PP* [1967] 2 MLJ 25, some blood marks were also found on the accused's clothes. The Federal Court pointed out that the mere fact that there were blood marks on the clothes of the accused were not conclusive of the fact that he killed the deceased. The court pointed out (at p 28):

> The real question which they [the jury] had to decide was whether or not the explanation [given by the accused] might reasonably and probably have been true.

(c) Blood marks and mud marks in the bathroom

It was the submission of the DPP that the small blood marks found on the bathroom floor or on a rubber hose were caused by the blood dripping from the hands of the accused when she went to the bathroom to wash her hands after having them covered with blood.

As to the mud marks, the defence argued that there were traces left behind by the intruder, whilst the DPP contended that these mud marks were deliberately made by the accused so as to give a semblance that someone had entered through the bathroom window.

(d) Rear gate and the lock and key (P45 and P45A)

A similar argument was raised by counsel for the accused and by the DPP. Counsel for the accused maintained that the fact that the rear gate was open indicated that an intruder must have entered or left through this gate, whereas the DPP argued that the accused had again deliberately opened the gate so as to give the appearance that someone had entered or left the house through the gate.

Again based on the evidence of Shanta, it was submitted by the DPP that as the rear gate was always locked and that the keys to the lock were kept in a drawer inside the house, the accused must have necessarily opened it so as to cover up any suspicion upon her.

(e) Jewellery

The prosecution called Anthony Leopold (PW28) just to testify on the fact that on the morning of the death of the deceased, the accused had given the witness's wife certain pieces of jewellery and a watch belonging to the deceased for safekeeping.

Not much adverse inference can be drawn on this action of the accused, as it can be inferred that the accused had wanted to keep her husband's possession for sentimental reasons, or to ensure they were safe before anyone else took it away from her. In any case, if she had truly wanted to keep it for herself, she could have hidden them much earlier or even after her alleged slaying. Furthermore, ASP Rosley, the investigating officer, had also testified earlier that the accused was reluctant to allow the police to take the chain which the deceased was wearing on the night of the

killing. Only when ASP Rosley gave her the assurance that the chain would be returned did she part with it. She clearly wanted to keep the chain in memory of her husband and not for greed. Therefore, I place little, or no weight on this piece of evidence.

(f) Conclusion on alleged incriminating evidence

Taken as a whole, or in isolation, none of these so-called incriminating evidence point to the guilt of the accused. Much of these explanations have been speculative in nature, raising much doubts. Taken to its extreme, even the combined effect of these evidence by themselves leaves one in doubt as to whether the accused had planned to kill her husband that night. On the other hand, these factors may possibly have assisted the prosecution's case had there been other more cogent evidence to indicate such an intention on the part of the accused. In this case, nothing else was established to indicate that these were traces of a bigger scheme or plan which the accused person had hatched for the evening.

It must further be emphasized that no evidence was adduced by the prosecution that any fingerprints of the accused was found on any exhibits or in any place in the house. There were no fingerprints on the knife, the lock and key of the rear gate, or even on the tap in the bathroom attached to the master bedroom where the accused is said to have washed her hands after the killing. In short, no finger print evidence was adduced at all.

Weakness in prosecution's case

(i) Lack of motive

As stated earlier, no clear motive had been established by the prosecution to show why the accused had possibly wanted to kill her own husband.

(ii) Killing was pre-planned

The prosecution also submitted that the accused had pre-planned the killing that night because she asked her children and the maids to go up to bed earlier than usual, together with the fact that she had chosen to sleep with her mother in the room downstairs.

But there are some unanswered questions. How did the accused know that her husband would return home drunk that night so that in that state, she could facilitate the slaying with ease. It was said by the doctor that as the deceased was drunk that night, he was fast asleep. Had he not been so, such serious injuries could not have been inflicted upon him as he would have been easily awoken.

Further was it physically possible for a woman to hold a knife like P9, a short one too at that, with a stunted handle, in a kneeling position as contended by the prosecution? Prof Kasinathan had said in evidence that the assailant had to be in a standing position to have that amount of force to inflict the fatal blows and to chop the neck continuously with four blows. Did she have such strength? Was the knife that sharp?

(iii) Early suspicion

From the testimony of ASP Rosley, the police investigation was conducted swiftly and the police were satisfied from the begining that it was an 'inside job'. As such, they narrowed down their suspicion to the accused at a very early stage of their investigation. Hence, her clothes were taken for examination. ASP Rosley even asked her to hand over to him the clothes that she was wearing on the morning when he came to the house. He took nail clippings from her and finally, after a few days in remand, only released her mother and the two maids from custody and not the accused. The police were confident enough that they had identified the correct suspect, such that they even allowed the Indonesian maid, an illegal one at that, to be released without ensuring that she would be available as a witness at the trial (see the decision of Mohtar Abdullah JC (as he then was) in *PP v Abu Bakar bin Abdul Malek* [1990] 1 CLJ 1179, where his Lordship castigated the police for not ensuring that the Bangladeshi illegal immigrant who was an important witness was available to give evidence at the trial).

(iv) Witnesses

The police appear to have sought much assistance from the deceased's family to obtain information on the accused. It was evident from the testimonies of the many witnesses that there was much animosity between the accused and her in-laws. To say the least, she was not well liked by them and the family had always borne a disliking for her, such that even the children of the deceased chose not to stay with them. The police, therefore, ought to have viewed this assistance rendered by some of the members of the deceased family with some reservation.

As stated earlier, 26 witnesses were called by the prosecution. These witnesses were called to testify on the following broad categories of evidence:

(a) Police investigation conducted on the murder. Police personnel who went to Marid's house that morning when the police received the telephone call informing them of the death of Marid, the photographers who took photographs of the house and other exhibits, and the investigating officer ASP Rosley all gave evidence.

(b) To establish motive on the part of the accused. Several witnesses were called for this purpose, particularly Shanta, Mrs Koshy, Salim, Parvin and Anthony.

(c) Formal witnesses. This included the chemist and the pathologist.

(d) Others. Several family members of Marid also testified including Marid's mother, brother, sister, brother-in-law, and nephew. Ravi, the financial controller in Marid's company, also gave evidence.

Though the prosecution attempted to elicit testimonies from these witnesses to advance the prosecution's case, much evidence was also extracted from these witnesses by counsel for the defence in his cross-examination. Much of these evidence were in favour of the accused, thereby creating doubts in the prosecution's case.

A The prosecution witnesses like Salim, Parvin, Ravi and Anthony gave honest and impartial testimonies which tended, not so much to strengthen the prosecution's case, but rather to create doubts or weaknesses in its case. As for the family members of Marid who were called to testify as prosecution witnesses, except for the sister (Sharanjit Kaur) and the brother-in-law (Parl Singh), little credibility could be given to the testimony of the B brother, Tarvarsal Singh ('Rocky') and the mother ('Mdm Harpal Kaur'). Rocky's testimony was, to say the least, partial, contradictory, and unreliable, whereas Mdm Harpal Kaur, who was so overcome with emotion whilst giving her testimony, gave evidence which was clearly contradictory to that stated by other family members, especially Sharanjit Kaur regarding the C true relationship between the family and the accused.

Shanta, who is currently working for Mdm Harpal Kaur, the mother of Marid in Marid's house, had been an employee of the deceased and the accused prior to the deceased's death. She, by her own admission, was well looked after by both the deceased and the accused. The accused treated D her well and she was close to the children. Having been so close to the family, she then become a prosecution witness. During her testimony, it was clear to this court that she was generally uncomfortable giving evidence against her former employer. She gave her evidence in a garbled manner — sometimes inconsistent, sometimes contradictory, sometimes evasive and at most times nervous and unsure of the consequences of her own answers.

E Quite clearly, therefore, some of these prosecution witnesses were in some ways 'interested parties', or there was a possibility of biasness or partiality on their part. In this regard, the following observations of Raja Azlan Shah J (as he then was) in *Liow Siow Long v PP* [1970] 1 MLJ 40 is pertinent (at p 41):

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> It is difficult to accept the suggestion that if a witness is shown to be a relation of the deceased his evidence is tainted. Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses are competent witnesses who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses, eg they are either partisans of the complainant or G are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon.

The following passages from *Blackstone's Criminal Practice 1991* is also relevant (at para F7.20):

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> Evidence has always been admissible to contradict a witness's denial of bias or partiality towards one of the parties, and to show that he is prejudicial concerning the case being tried (*Mendy* (1976) 64 Cr App R 4, per Geoffery Lane LJ at p 6).

It is further pointed out by the learned editors as follows (para F12.14):

I

> Risk of collusion between witness
>
> It is obvious that striking similarity between accounts of events given by different witnesses does not prove guilt if it can be accounted for by collusion. The question is whether evidence which may bear the taint of

> conspiracy should be left to the jury with a suitable warning, or whether the trial judge should exercise his discretion to exclude it altogether.

See also the cases of *R v Phillips* (1936) 26 Cr App R 17, and *R v Beck* [1982] 1 All ER 807.

(v) Lack of cautioned statement

In his opening speech, the learned DPP stated that besides circumstantial evidence which he would be relying upon to establish the prosecution's case against the accused, he will also be tendering a cautioned statement containing a confession of the accused. However, almost at the end of the prosecution's case, he informed the court that the prosecution had decided not to tender the cautioned statement. Whether to tender the cautioned statement or not is, of course, the privilege of the prosecution. However, in this present case, without it (if it had been held to be admissible), the prosecution had further difficulty in establishing its case against the accused.

Other aspects of the trial

(a) Hearsay evidence

During the course of the trial, a number of questions put to the witnesses either by the DPP in the examination-in-chief or by the defence counsel in cross-examination, were objected to by one or the other party on the ground that they were inadmissable as being hearsay.

Following the principles enunciated by the Privy Council (on appeal from Malaysia) in *Subramaniam v PP* [1956] MLJ 220, and as explained in by the Federal Court in *Leong Hong Khie v PP* [1986] 2 MLJ 206, a number of rulings were made by this court to allow or disallow some of these statements.

In *Subramaniam*'s case, the Privy Council observed as follows (at p 222):

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

In *Leong Hong Khie*, Seah FJ in delivering the judgment of the Federal Court, explained this principle as follows (at p 209):

> In our opinion, the general proposition laid down by the Privy Council in that case must be read subject to this condition, viz that the statement must be directly relevant in considering the state of mind of the witness to whom it had been made. In other words, the proposition could only apply when the mental state of the witness evidenced by the statement was itself directly in issue at the trial. What a witness said or heard said might well be the best

A and most direct evidence of that witness's state of mind. Support for this very restricted construction may be found in the *Subramaniam* case where the Privy Council said at p 222: (quoted above).

In that case, the Federal Court held that the oral statements made to the witness by two informers, neither of whom was called to testify were B inadmissable, as being hearsay evidence, as the prosecution had failed to satisfy that the statements were directly relevant in considering the state of mind of the witness to whom it was made.

Similarly, in *Karam Singh v PP*, the Federal Court held that the statements made to the deceased's son, who was called as a witness, that his father (the deceased) had told him of a quarrel between him and the C accused on the night before he was killed was inadmissable as being hearsay.

(b) Statement made by accused

D ASP Rosley when recovering the dress (the maxi, P20A) said that when he asked the accused person whether this was the dress she was wearing on the night her husband was killed, the accused had nodded. Mr Bachan Singh, counsel for the defence objected to the admissibility of the statement on the ground that at the time when ASP Rosley asked this question, the accused was already under arrest. The DPP, however, argued that as ASP E Rosley had stated that the accused was only arrested after this question was asked of her, the statement was admissible.

Whether the accused was already under arrest when ASP Rosley asked her about the dress is a question of fact: at what time was the accused really arrested? It would appear that as soon as the police concluded F that the killing was 'an inside job', the police had narrowed down their suspicion to the accused. ASP Rosley said in cross-examination that at that stage, if the accused had attempted to flee, he would have taken steps to restrain her from doing so.

Mr Bachan Singh therefore contended that following the views of Edgar Joseph Jr J (as he then was) in *PP v Neoh Wan Kee* [1985] 1 MLJ G 368 and Peh Swee Chin J (as he then was) in *PP v Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360, the accused in the present case was already under arrest when the statement was made by her to ASP Rosley. I tend to agree with this submission. I therefore hold that even if such a statement was made by the accused to ASP Rosley, it is inadmissible. Sometimes, it is the H perception of the individual which is important — whether he feels compelled to make the statement. Furthermore, it is difficult to envisage that ASP Rosley would have asked the accused to hand over to him her clothes, even before her arrest.

Even if I am wrong in the view I have taken that the statement was I inadmissible as it was made after her arrest without any caution having been administered, the manner in which the dress had the blood stains was not clearly established by the prosecution. Therefore, even if the statement was made by the accused to ASP Rosley with the accused nodding her head in answer to the question whether she was wearing this particular

dress on the night before is held to be admissible, little importance can be placed on it. As counsel for the defence suggested, these stains could have been caused when the accused held her husband in her arms on seeing him dead or at any other time when she held him.

(c) Locus in quo (the view)

At the request of the DPP, this court adjourned to view the locus in quo of the incident, ie the house where Marid was killed. The law governing the view of the locus in quo is as follows: (i) a view is part of the evidence; (ii) the judge must take a view in the presence of both parties; or both parties must be given the opportunity of being present; the only exception is where the judge goes to see some public place, eg the scene of a road accident; and (iii) the judge should not attend anything in the form of a demonstration or reconstruction in the absence of the parties: see *Parry v Boyle* (1986) 83 Cr App R 310.

In May, *Criminal Evidence* (3rd Ed) (1995), it is pointed out as follows (para 2-06):

> The judge and the defendant should always be present at a view, whether witnesses are present or not. Normally, the whole court will adjourn to the place where the view is being held including counsel and the shorthand writer. The jury then examine the place or thing without anything being said. A witness or defendant may give a demonstration, but must make no communication to the jury. If any questions arise on the view or if the jury have any questions about it, the usual course is for such questions to be asked in court after the view is over. The fact that a witness has already given evidence does not prevent him taking part in a view, provided that he may be recalled to be cross-examined.

It is further pointed out in *Blackstone's Criminal Practice* (at para F8.35) as follows:

> The judge should take precautions to prevent any witnesses who are present from communicating, except by way of demonstration, with the jury (*Martin* (1872) LR 1 CCR 378; *Karamat v The Queen* [1956] AC 256). A witness who has already given evidence at the trial may take part in a view, but witnesses taking part in a view should be recalled to be cross-examined, if desired.

The Federal Court in *Mohamed bin Salleh v PP* [1967] 1 MLJ 184 held that as one of the jurors had questioned the accused during the view, the trial ought to be vitiated and a new trial ordered.

In accordance with some of these principles, this court ordered that the following procedures be observed during the view:

(a) the accused to be present;

(b) any conversation conducted during the view ought to be within the hearing of the accused;

(c) no questions were to be asked of the accused;

(d) as the view was part of the court proceedings, the whole court shall adjourn to view the place; and

(e) no photographs were allowed inside the house.

Burden of proof at the end of the prosecution's case

Whatever doubts that existed before as to the proper test to be applied at the end of the prosecution's case, it is now clearly established that following *Arulpragasan*'s case, the test to be applied is the test of 'beyond a reasonable doubt', and not the conventional 'prima facie' test. In *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1, it was held by the Federal Court, by a majority (as stated in the headnotes of the report) as follows:

> *The prosecution had to prove every ingredient of a charge* and at the end of the case for the prosecution, the court should then evaluate all the admissible evidence as adduced relevant to the charge and decide whether to call an accused to enter his defence. Under s 180 of the [Criminal Procedure Code], the prosecution was obliged to make out against an accused a case which if unrebutted would warrant his conviction before the accused could be called upon to enter on his defence. Since in order to convict the accused, if the case for the prosecution was not rebutted, *the court must be satisfied of the guilt of the accused beyond all reasonable doubt*, the court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt; therefore *the standard of proof required from the prosecution at the close of its case, in a non-jury trial in Malaysia was*, having regard to the statutory formula in s 180 of the [Criminal Procedure Code], the usual criminal standard of proof, to wit, *the beyond all reasonable doubt standard of proof, which called for a maximum evaluation of the evidence tendered by the prosecution. 'A more rigorous test of credibility' was to be applied to the prosecution's evidence*, instead of the much lower *Haw Tua Tau v PP* [1981] 2 MLJ 49 standard of proof of a mere prima facie case which called for a minimal evaluation of the evidence tendered by the prosecution. (Emphasis added.)

Eusoffe Chin Chief Justice observed as follows (at p 12):

> It is trite law that the onus is on the prosecution throughout the case in any criminal trial to prove the charge against the accused beyond reasonable doubt. In my view, the same standard of proof applies at the intermediate stage of the trial, ie at the close of the prosecution.

His Lordship added (at p 12):

> Assuming that the accused person elects to remain silent and does not wish to call any witness or produce any document for his defence then he will have failed to rebut the evidence adduced by the prosecution and the court must be prepared, there and then, to convict the accused person of the offence charged. This is the requirement of s 180 of the [Criminal Procedure Code].

To overrule the decision in *Arulpragasan*'s case, Parliament in 1997 enacted the Criminal Procedure Code (Amendment) Act 1997 to reintroduce the prima facie test.

The amendments came into force on 31 January 1997. Though it was at one time thought that the amendments, and hence the prima facie tests, were applicable to cases which had not commenced on the date of

not coming into force of the Criminal Procedure Code (Amendment) Act 1997, this issue as to whether the amendments were retrospective has now been firmly resolved. It was then argued that as art 7(1) of the Federal Constitution prohibited Parliament from enacting only retrospective criminal legislation which were substantive in nature, it did not prohibit Parliament from introducing retrospective criminal legislation which were procedural in nature. In the recent case of *R v Makanjuola* [1995] 3 All ER 730, Lord Taylor of Gosforth CJ in delivering the judgment of the Court of Appeal observed (at p 732):

> The general rule against the retrospective operation of statutes does not apply to procedural provisions (see *Bennion on Statutory Interpretation* (2nd Ed, 1992) p 218 and the cases there cited). Indeed, the general presumption is that a statutory change in procedure applies to pending as well as future proceedings. Here, the change effected by s 32(1) [Criminal Justice and Public Order Act 1994] was clearly procedural.

The dichotomy between 'substantive' and 'procedural' provisions in any amendment to the rules governing criminal procedure is now academic. In the recent case of *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 delivered on 4 November 1997, the Federal Court expressly held that the amendments made by the Criminal Procedure Code (Amendment) Act 1997 only applied to acts or omissions constituting a criminal offence committed on or after 31 January 1997. In other words, the Federal Court held that the amendments to the CPC were not retrospective in operation and as such the 'beyond reasonable doubt' test as laid down in *Arulpragasan*'s case would apply at the close of the prosecution's case for offences committed before 31 January 1997. Peh Swee Chin FCJ, in delivering the judgment of the Federal Court, observed as follows (at p 16):

> The said amendment if enacted to operate retrospectively would have so run foul because if an act or omission before 31 January 1997 cannot evidentially be proved at any time to have been committed beyond a reasonable doubt at the close of prosecution case, the perpetrator of the act or commission would not be called for his defence and therefore would not be punishable any more. But if the act or omission in question not punishable in the way stated above can be proved by way of a prima facie case at the close of prosecution case (a much lesser burden of proof), then the said perpetrator will have his defence called. He will then be in jeopardy of failing possibly to throw or cast a reasonable doubt on the prosecution case, and such failure will be punished in a manner as provided by law. Article 7(1) of the Federal Constitution would thereby have been infringed, though very clearly in spirit if not by letter.

See also the Federal Court decision in *Bahruni bin Ismail v Pendakwa Raya* [1997] 2 MLJ 26.

It is therefore clear that the high standard of proof as required under the 'beyond reasonable doubt' test is applicable in the present case. It is sometimes said that in practical terms the 'beyond reasonable doubt' test is no different from the 'prima facie' test. Such a view is clearly erroneous. In *Arulpragasan*'s case, the majority decision clearly demonstrates that a higher level of proof is required under the beyond reasonable doubt test to

A that required of the prosecution under the prima facie test. In fact, under the 'beyond reasonable doubt' test, the evidence, without the evidence of the accused, ought to be such that the court must be prepared to convict the accused on the evidence adduced by the prosecution alone. If defence is to be called, it ought to be only for the purpose of allowing the defence to raise any of the exceptions under the Penal Code (FMS Cap 45), or to B rebut any presumptions which may be applicable in the case at point. Defence ought not to be called for any other reason. In this regard, the following observations of Sharma J in *PP v Saimin & Ors* [1971] 2 MLJ 16 is poignant (at p 17):

> C It is the duty of the prosecution to prove the charge against the accused beyond all reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer. The proof of a case against the accused depends for its support not upon the absence or weakness of the explanation on his part but on the positive affirmative evidence of his guilt given by the D prosecution.

Conclusion

Following the Federal Court decision in *Arulpragasan*'s case, and applying the high standard of proof as expected of the prosecution at this stage, that E is at the close of the prosecution's case, which is no different to that expected at the end of the trial, together with the fact that the prosecution had to depend on some weak strands of circumstantial evidence, and further without the assistance of a caution statement containing a confession to tighten these strands as earlier contemplated by the prosecution, no F court of law with the available evidence can safely hold that the prosecution has established its case against the accused beyond a reasonable doubt. Our legal system does not allow our courts to take away the life of an individual based on these available evidence alone.

On the maximum evaluation of the evidence available before this court, therefore, I hold that the prosecution at the end of its case has failed G to establish a case against the accused beyond a reasonable doubt as required under s 180 of the CPC.

In the present case, the DPP had earlier submitted that the various strands of circumstantial evidence when tied together became a strong rope, strong enough to tie a knot around the neck of the accused (per H Thomson CJ in *Chan Chwen Kong v PP* [1962] MLJ 307, referred to by the Federal Court in *Jayaraman & Ors v PP* [1982] 2 MLJ 306).

I am afraid that I am unable to agree with the DPP. Each of the strands of the circumstantial evidence adduced by the prosecution are so brittle that even when tied together they are not strong enough for the I prosecution to hold on to. In fact, the entire string of strands do not withstand the weight, but merely snap through lack of sufficient evidence, leaving the prosecution merely to be clutching at straws, not ropes.

I therefore acquit and discharge the accused Sarjit Kaur.

Postscript

I order that all exhibits be kept in police custody until the period of appeal has lapsed.

The mystery surrounding the murder of Mr Marid Singh remains unresolved. As I stated earlier, it is not the duty of the court to unravel mysteries or even suggest that any person was behind it or to assign any motive on anyone's part. I am confident that the relevant authorites will bring to justice those involved in this heinous crime.

Finally I wish to make the following comments:

(a) It is hoped that you, Sarjit Kaur, will now forget the nightmare you have experienced and attempt to return to your normal life. There had been many who have been affected by your husband's death — you, your family, particularly your three children, and friends. It must have been a traumatic experience for the children, so soon after losing their father, with hardly any time to grieve, they were also deprived of the comfort and consolation of their mother especially so now that their grandmother, your mother, has also died whilst you were on remand. It is now your duty to give them the strength and guidance so that they too can recover from this tragedy.

(b) The time has also come for all animosities between the families to come to an end. It has to be patched up for the sake of the children so that they too can enjoy the love of their paternal family.

(c) Finally, I wish to commend En Zakaria Merican, the DPP, and Mr Bachan Singh and his team in assisting this court during the hearing of this trial. The daily hearing for a continuous period of almost a month must have taken its toll on you.

(d) I also record the assistance rendered by the court staff, particularly the registrar, the interpreters, the police and the prison authorities. In the search for justice, they have all withstood the test of time.

Accused acquitted and discharged.

Reported by David Lai